

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Telecommunications Services) CS Docket No. 95-184
Inside Wiring)
)
Customer Premises Equipment)

Comments of Charter Communications, Inc. and Comcast
Cable Communications, Inc.
on the Notice of Proposed Rulemaking

Terry S. Bienstock, P.A.
Philip J. Kantor, Esq.
Barry A. Pineles, Esq.
Bienstock & Clark
First Union Financial Center
200 S. Biscayne Boulevard, Suite 3160
Miami, FL 33131
Telephone: 305-373-1100
Facsimile: 305-358-1226

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EXECUTIVE SUMMARY

The Commission initiated the rulemaking in CS Docket No. 95-184 to address issues of inside wiring in a world of technological convergence. Charter Communications, Inc. and Comcast Cable Communications, Inc. (hereinafter "Charter" and "Comcast") as providers of broadband services, have an interest in providing other telecommunication services over their broadband networks and will be affected by the outcome of this proceeding.

Charter and Comcast do not believe that technological convergence will lead to provider convergence. A multiple provider environment will achieve the goals and objectives that Congress has set out in the Telecommunications Act of 1996 including maximization of consumer choice, competition in the marketplace, and achievement of universal service.

The notice of proposed rulemaking (hereinafter "NPRM") raises five broad issues: 1) the location of demarcation points for determining who owns the wiring; 2) the technical parameters that will govern connection between customer premise equipment and the service provider network; 3) the appropriate model for regulating telephone wiring; 4) the rules for ensuring access to private property for the installation of wiring; 5) the regulation of customer premise equipment; and 6) the resolution of problems associated with regulation by both state and federal authorities over wiring issues.

It may be premature for the Commission to take final action on all of these issues because the FCC's efforts to implement the Telecommunications Act of 1996 will have a dramatic impact on the decisionmaking process in this rulemaking. Charter and Comcast assert that the Commission should expeditiously resolve the

access and demarcation issues raised in this rulemaking but should take a more cautious approach to other aspects of this rulemaking until the Commission is further along in the implementation of the Telecommunications Act of 1996.

Charter and Comcast believe that the most important issue in this rulemaking is access to private property. Without gaining access to private property, franchised cable operators will not be in a position to provide the multitude of services that technological convergence will bring to individual consumers. In turn, the lack of access will prevent cable operators from fully competing in the broadband service marketplace, reduce competition, raise prices, and decrease the likelihood that universal service will be achieved. Charter and Comcast believe that the FCC should adopt a regulation interpreting the access provision in the Cable Communications Policy Act (hereinafter "CCPA") that would authorize a franchised cable operator to apportion an easement already used by another utility whether or not the grantor of the easement concurs in its use by the cable operator. The Commission considered adopting such a regulatory interpretation in 1985 but decided that the CCPA was self-executing.

While resolving the access issue will go a long way to resolving the problems faced by franchised cable operators in providing broadband services, the issue of demarcation points also is important. Charter and Comcast agree with the Commission that one demarcation point is appropriate and that point should be the cable model demarcation point. Charter and Comcast believe that this point gives the resident the widest choice of providers with the least amount of disruption to the property. Charter and Comcast also opine that the Commission should require the

provider of the broadband service, not the customer, to ensure compliance with requirements against signal leakage and interference.

Charter and Comcast believe that the cable demarcation model is appropriate for single family dwellings but does not go far enough in ensuring that residents in multiple-dwelling units (hereinafter "MDUs") have similar access to a range of providers. Charter and Comcast assert that the demarcation for MDUs should be at the wall plate of the individual unit. Complex wiring, such as private branch exchanges, installed at the request of the MDU owner, still would be owned by the MDU. In this way, residents, rather than rental MDU owners or condominium associations, will have access to each and every provider willing to install wire to the MDU. Residents in MDUs then will benefit from competition with lower prices and greater technical innovation. In turn, the multiplicity of providers operating in a competitive environment will lay the foundation for the achievement of universal service.

Charter and Comcast do not believe that changing the demarcation point for MDUs will act as a barrier to entry by wireless cable operators and satellite master antenna television systems into MDUs. Generally, these alternative video program distributors post-wire buildings. When they try to bootstrap their way into a MDU on the wiring installed by the cable operator, it is in an effort to artificially lower their price in comparison to that charged by the franchised cable operator. Charter and Comcast do not believe that this creates a level playing field. If the alternative video provider wishes to provide service, it should do what the cable operator did -- expend the necessary capital to wire the building.

Charter and Comcast assert that it is premature to adopt a specific technical connection standard for a converging universe. When the rules and visions of this new telecommunications universe are more settled, the Commission will be able to select the most appropriate standard. Charter and Comcast opine that any standard selected by the FCC must be transparent to the customer, i.e., the customer can switch among the various providers without incurring significant rewiring or remodeling costs.

Resolution of dual regulation should be undertaken through the establishment of a federal/state joint board convened pursuant to 47 U.S.C. § 410. Furthermore, Charter and Comcast are concerned that local exchange carriers will allocate the majority of their costs in constructing these new broadband networks to their local telephone customers. This type of subsidization will not promote healthy competition contemplated by Congress when it eliminated the barriers between various classes of broadband service providers.

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Pursuant to 47 C.F.R. §§ 1.415, 1.419, Charter Communications, Inc. and Comcast Cable Communications, Inc., through their attorneys, file the following comments in the above-captioned proceeding.

Charter Communications, Inc. (hereinafter "Charter") is a multiple system manager of cable systems throughout the United States. The systems Charter manages serve approximately 900,000 subscribers many of which are located in multiple dwelling units (hereinafter "MDUs"), or in single family residences located in developments subject to governance by a homeowners' association. Comcast Cable Communications, Inc. (hereinafter "Comcast") serves roughly 3,400,000 million subscribers in 18 states and many of its subscribers also are located in MDUs or single family residences within planned unit developments. Charter and Comcast, as providers of broadband video services, have an interest in providing other

telecommunication services over their broadband networks and will be affected by the outcome of this proceeding.

I. *Introduction -- Convergence and Commission Decisionmaking*

The convergence of services once separated by both regulators and technology is the impetus behind this rulemaking. Soon, cable operators will be able to provide voice and data transmission over their broadband wires while LECs will expand their narrowband facilities in order to offer broadband services such as video. The Commission's rules governing wiring and customer premises equipment were not developed with this convergence in mind; the FCC realizes this and instituted the current rulemaking to address those issues of convergence.

Within two weeks of the issuance of the notice of proposed rulemaking (hereinafter "NPRM"), President Clinton signed into law the Telecommunications Act of 1996. The Act addresses or requires the Commission to institute rulemakings to address many of the questions propounded in the NPRM. Despite those changes, the FCC is forging ahead with this rulemaking.¹

Charter and Comcast believe that maximizing individual consumer choice must be the guiding principle in this rulemaking. Consumers only will have a realistic choice in selecting various broadband service providers if the current multiple providers to the home are not forced to aggregate their wire so that only one wire runs into the home.

¹ The Commission's proposed schedule to implement the Act provides for incorporation of this docket into the rulemakings addressing such issues as a competitive market for cable service customer premises equipment.

Maximizing individual consumer choice achieves other important objectives announced in the Telecommunications Act of 1996. Consumer choice ensures that one service provider does not dominate the delivery of all types of telecommunication and cable services.² Competition will increase the introduction of new technologies and keep costs to consumers low. In turn, the low costs will assist in attaining universal service -- another critical aspect of the Telecommunications Act of 1996.³ Finally, the Commission must establish rules that do not give unfair economic advantage to incumbent LECs because any undue economic advantage given to LECs will defeat the goals of Congress and the Commission in ensuring maximum individual consumer choice, a competitive broadband marketplace, and universal service.

Charter and Comcast do not believe that technological convergence necessarily leads to provider convergence. In fact, the Commission must make certain that multiple providers of broadband service, be it simply video programming or other telecommunication services, exist in order to reach the goals set forth in the NPRM and the Telecommunications Act of 1996. Charter and Comcast believe that their interest in retaining ownership of their wiring, rather than acting as a barrier to multiple broadband entrants, will spur the entry of new wireline providers of

² Section 302 of the Telecommunications Act of 1996 creates a new section in the Communications Act of 1934, § 652, which generally prohibits buyouts and other joint ventures between incumbent local exchange carriers (hereinafter "LECs") and franchised cable operators.

³ Section 254(c) of the Telecommunications Act defines universal service as "an evolving level of telecommunications services...." One of the guiding principles of that evolving level is access to advanced information services. *Id.* at § 254(b)(2).

broadband services and help reach the lofty goals that Congress sought when it enacted the Telecommunications Act of 1996.

II. *The NPRM*

Given the uncertain regulatory environment in which this rulemaking was developed, it is not surprising that the NPRM addresses many broad, often interrelated issues.⁴ The Commission specifically requested comments in the following categories: 1) the location of demarcation points for determining who owns the wiring; 2) the technical parameters that will govern connection between customer premise equipment and the service provider network; 3) the appropriate model for regulating telephone wiring; 4) the rules for ensuring access to private property for the installation of wiring; 5) the regulation of customer premise equipment; and 6) the resolution of problems associated with regulation by both state and federal authorities over wiring issues.

III. *Access to Private Property*

While the Commission the issue of access to private property receives scant attention in the NPRM, Charter and Comcast believe that access represents the most critical issue to ensure that individual consumers can select from a variety of broadband providers and not just one provider.⁵

⁴ Charter and Comcast believe that some of the uncertainty has been resolved by the enactment of the Telecommunications Act of 1996. Charter and Comcast will briefly address those issues in these comments.

⁵ Access to private property generally is not a significant issue with respect to single family homes because the homeowner's decision to grant or deny access is tantamount to a decision on the service provider and whether the homeowner desires more choices. The Commission's goal of maximizing consumer choice will not be affected if the homeowner denies access to his or her property. In certain instances,
(continued...)

If goals of universal service are to be achieved, all consumers need to have the ability to select the most appropriate broadband service providers -- not just those fortunate enough to live in single family homes unencumbered by the restrictions of HOAs. Without the ability for each individual customer to make the selection whatever their living arrangement, the United States will fragment into the telecommunication haves and have nots -- a goal not sought by either the President, the Congress, or this Commission.

Under most state laws, telephone companies, electric utilities, and local distribution companies for natural gas have access to property either through the power of eminent domain or through statutory easements. *E.g.*, La. Rev. Stat. Ann. § 45:781; Me. Rev. Stat. Ann. tit. 35, § 2306. Cable operators generally do not have that power. Under the Telecommunications Act of 1996, cable operators potentially will face competition from these companies that can exercise the power of eminent domain. Cable operators, such as Charter and Comcast, will be at a distinct disadvantage in competing since they will be unable to gain necessary access to private property.

Franchised cable operators usually have access to public easements, some of which may have been obtained by a public utility's exercise of its eminent

⁵(...continued)

the denial of access may inhibit the ability of the cable operator to compete when the property owner granted the easement to the telephone company or electric utility.

However, access to single family homes becomes a significant issue when a developer of a planned unit development of single family homes or the homeowners' association (hereinafter "HOA") acts as the gatekeeper and prohibits a cable operator from gaining access to the development as a whole; thus, vitiating the homeowner's ability to choose between providers of service. *E.g.*, *Centel Cable Television Co. v. Admiral's Cove Assoc., Ltd.*, 835 F.2d 1359 (11th Cir. 1988).

domain powers. On the other hand, public utilities often are granted private easements by property owners to supply electric and telephone service. Property owners grant the easements to utility companies because they would be unable to obtain these services absent the easement since the utility is a monopoly provider of the service. However, property owners often have a choice between a franchised cable operator and other providers of multichannel video programming, such as satellite master antenna television systems (hereinafter "SMATV") and multipoint multidistribution systems. Therefore, property owners have far fewer incentives to grant an easement to the franchised cable operator.⁶ Congress attempted to rectify this disparity.

Section 621(a)(2) of the Cable Communications Policy Act, 47 U.S.C. § 541(a)(2) (hereinafter "CCPA"), provides that "[a]ny franchise shall be construed to authorize the construction of a cable television system over public rights-of-way, and through easements which is within the area to be served and which have been dedicated for compatible uses...." Cable operators believed that this subsection of the CCPA would give them access to utility easements. The National League of Cities and the United States Conference of Mayors also believed that the enactment of this subsection would end legal disputes concerning access to private property for cable operators.⁷ However, cable operators were in for a rude awakening.

⁶ Most cable franchises do not authorize the cable operator to construct its system without the consent of property owners. Nor do the agreements authorize the cable operators to use any easements other than public easements. *E.g.*, Broward County, FL Ordinance 94-1, § 1.28.

⁷ National League of Cities & United States Conference of Mayors, *A Local Government Guide to the New Law: Cable Franchising and Regulation* III-E-5 (1985)

Cable operators promptly sought access to public utility easements in order to construct cable systems. For example, in Cobb County, Georgia, the cable operator sought access to two rental MDUs. The owner of the MDUs had granted easements to Georgia Power and BellSouth and entered into an exclusive service agreement with a SMATV operator, granting it an easement.

The franchised cable operator sought access to the MDUs via the easements granted to Georgia Power, BellSouth, and the SMATV operator, but was denied such access by the property owner. The cable operator brought suit in federal district court alleging that the property owner violated its rights under the CCPA. The district court granted the cable operator access to the compatible easements extending into the interior of the buildings. However, the appellate court determined that § 621(a)(2) does not include wholly private easements granted to utilities because it found that the statutory term "dedicated" should have the same meaning that it has in real property law.⁸ *Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 606 (11th Cir. 1992).

The decision in *Cable Holdings* is particularly troublesome because it misreads the legislative history of § 621(a)(2). Congress expected that "any private arrangements which seek restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable." H.R. Rep. No. 934, 98th Cong., 2d Sess. 59 (1984). Congress, in

⁸ Dedicated in this context means that the private property owner must entirely relinquish his rights of exclusion regarding the easement so that the general public may use the property. Black's Law Dictionary 412 (6th ed. 1990). The judicial interpretation essentially vitiated the utility of § 621(a)(2) since cable operators may already use public easements under their franchise agreements.

essence, intended to preempt state laws that acted as a barrier to cable operators gaining access to private property through easements available to other utilities.

Other courts have agreed with the *Cable Holdings'* interpretation⁹ of the statute and its legislative history in denying cable operators access to private property by giving a constricted interpretation of the CCPA access provisions. *TCI, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993); *Media General Cable, Inc. v. Sequoyah Condo. Council*, 991 F.2d 1169 (4th Cir. 1993); *Cable Investors, Inc. v. Woolley*, 867 F.2d 151 (3d Cir. 1989); *Cable Assocs., Inc. v. Town & Country Mgmt. Corp.*, 709 F. Supp. 582 (E.D. Pa. 1989). Therefore, in numerous parts of the country, franchised cable operators are denied access to private property because they cannot utilize the easements that Congress expected them to have access in order to construct their systems.

Charter and Comcast are aware of other situations in which franchised cable operators were denied access to MDUs and developments governed by homeowners' associations. These situations further typify the access problems that were not solved by the enactment of the CCPA or the application of other state laws.¹⁰

⁹ While other circuits may have agreed with the decision in *Cable Holdings*, the law in the 11th Circuit is itself quite muddled. As Judge Tjoflat pointed out, the 11th Circuit has "two rules of law... concerning the proper construction of section 621(a)(2). To potential litigants (and to me) this circuit's interpretation of section 621(a)(2) is confused." *Cable Holdings*, 988 F.2d at 1082 (Tjoflat, dissenting).

¹⁰ Charter and Comcast, in comments filed with the Commission today in MM Docket No. 92-260, note that courts have taken various positions on statutes authorizing entry of cable operators to MDUs and other private property. Charter and Comcast do not believe those statutes provide an adequate remedy for obtaining access. Moreover, as the Commission recognizes, access statutes, to the extent they are at all valid, only exist in thirteen states. NPRM ¶ 60.

For example, a cable operator in Dade County, Florida entered into a right-of-entry agreement with a rental MDU. The agreement provided, as do most right-of-entry contracts, that all of the wires will be owned by the cable operator. Upon termination of the contract, the rental MDU notified the cable operator that it was considering entering into an agreement with a SMATV operator. No action was taken. Four years later, the MDU finally contracted with a SMATV operator to provide multichannel video programming.¹¹ The cable operator sought access under Florida law and the court held that it did not have a right of access pursuant to state property law, despite the existence of a county ordinance that authorized entry.¹² The cable operator was forced to remove its wiring and now is unable to serve any of the residents in the rental MDU. Other instances exist in which cable operators, including Charter and Comcast, have been denied access to private property because the property owner had exclusive arrangements with someone other than the franchised cable operator.¹³

¹¹ In this instance, the SMATV operator paid the rental MDU owner \$30,000 to obtain exclusive access to the premises. Purchasing exclusive access is not uncommon for non-franchised alternative video providers. In some states, these payments are illegal. Va. Code Ann. § 55-248.13:2. The constitutionality of this statutory prohibition was upheld in *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123-24 (4th Cir. 1995).

¹² The decision was affirmed on appeal by a state appellate court in an unreported case.

¹³ E.g., *Century Southwest Cable TV v. Clif Assocs.*, 33 F.3d 1068 (9th Cir. 1995); *Media General Cable, Inc. v. Sequoyah Condo. Council*, 991 F.2d 1169 (4th Cir. 1993); *Centel Cable TV Co. v. Thomas J. White Dev. Corp.*, 902 F.2d 905 (11th Cir. 1990); *Cable Investors, Inc. v. Woolley*, 867 F.2d 151 (3d Cir. 1989); *Beattie v. Shelter Prop. IV*, 457 So. 2d 1110 (Fla. 1st DCA 1984).

In some instances where Charter and Comcast have obtained access or continued access to MDUs, they were required to expend significant sums through the judicial process in order to obtain or to continue access to private property. None of the public utility competitors to cable operators face additional transaction costs arising from the need to obtain access, such as litigation expenses and the cost of repairing already improved property due to delays in obtaining access.¹⁴ As a result, cable operators, in their efforts to provide broadband service, face a significant economic disadvantage even in situations in which the cable operator has installed wiring in a MDU. Additional transaction costs associated with denial of entry to property will inhibit the entry of additional broadband service providers to the market and reduce the probability that Congressional goals of competition and universal service will be achieved. Therefore, the Commission must resolve this issue of access.

The Commission has a number of mechanisms for increasing the access of cable operators to private property. First, the Telecommunications Act of 1996 may address, in part, some of these access issues.¹⁵ Second, the Commission can adopt an interpretation of the CCPA that effectuates the intent of Congress to authorize use of certain easements by cable operators. With respect to the access

¹⁴ *Cf. Centel Cable TV Co. v. Thomas J. White Dev. Corp.*, 902 F.2d 905, 910-11 (11th Cir. 1990) (discussing irreparable injury suffered by cable operators due to delay in obtaining access).

¹⁵ Section 251(a)(4) requires that telecommunications companies, including incumbent LECs provide "access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services...." This empowers the Commission to draft rules ensuring use of telephone company access but only to broadband service providers and not to cable companies operating solely under Title VI of the Communications Act of 1934.

to the private property easement provision of the CCPA, the Commission believed that the statutory provision was self-executing but subsequent court interpretations demonstrated that the Commission was wrong.

In that rulemaking, the FCC noted two possible interpretations of the term "dedicated." One is that dedicated means that the easement must be a grant for the public use of an easement. The Commission, in 1984, considered that interpretation to be unduly restrictive but did not act because it ultimately decided to promulgate rules concerning the implementation of the CCPA.¹⁶ The FCC appeared to favor an interpretation that the term "dedicated" was meant to be used, not in a technical real property sense, but in a more general sense as committed to other purposes.¹⁷

Charter and Comcast believe that the Commission should adopt a regulation prohibiting the property owner, no matter whether the property is used for a single family home or MDU, from denying a franchised cable operator access to an easement on the property when the owner already has granted or is obligated to grant an easement to other utilities, whether public or private.¹⁸ Charter and Comcast

¹⁶ Amendment to Parts 1, 63, and 76 of Commission Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,674 (1985).

¹⁷ *Id.*; see also *Century Southwest Cable TV v. CIIF Assocs.*, 33 F.3d 1068, 1070-71 (9th Cir. 1994).

¹⁸ Notice of the Commission Rules to Implement Provisions of the Cable Communications Policy Act of 1984, 49 Fed. Reg. 48,768 (1984). The Commission cannot deny that it has this power to preempt state and local laws that hinder the achievement of federal objectives. *City of New York v. FCC*, 486 U.S. 57, 69 (1988).

(continued...)

opine that this modification will resolve the access problems faced by cable operators in their efforts to enter MDUs and private property governed by HOAs. Cable operator access to private property will help achieve the goals set by the Commission for this rulemaking -- maximizing individual consumer choice, promoting competition, and attaining universal service. On the other hand denial of cable operator's right to access property will defeat these objectives, particularly for those residents of MDUs and HOAs.¹⁸

IV. Demarcation Point

Once cable operators have access to private property, the Commission still must determine who owns the wiring on the premises. The Commission requests comments on the appropriate demarcation point to ascertain where a provider's

¹⁸(...continued)

If the Commission adopted a regulation authorizing entry based on an interpretation of the CCPA's access provision, it would not be considered a taking of property under the Fifth Amendment to the Constitution. The CCPA simply federally codified a state law principle -- that an easement can be apportioned among various users. *See, e.g., CR/TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 107-09 (4th Cir. 1994); *Cousins v. Alabama Power Co.*, 597 So. 2d 683 (Ala. 1993); *Salvaty v. Falcon Cable TV*, 212 Cal. Rptr. 31 (Cal. Ct. App. 1985); *White v. Detroit Edison Co.*, 263 N.W.2d 367 (Mich. Ct. App. 1977); *Henley v. Continental Cablevision*, 692 S.W.2d 825 (Mo. Ct. App. 1985); *Hoffman v. Capitol Cablevision Sys.*, 383 N.Y.S.2d 674 (N.Y. Sup. Ct. 1976); *Joliff v. Hardin Cable TV Co.*, 269 N.E.2d 588 (Ohio 1971). Since the property already is burdened by the easement, the additional use of the property by the cable operator cannot be considered a taking. *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992). One federal circuit has considered on two separate occasions whether the additional use of the easement by the cable operator constitutes a taking and determined that it was not. *Thomas J. White Dev. Corp.*, 902 F.2d at 910; *Admiral's Cove*, 835 F.2d at 1363 n.7.

¹⁹ The denial of access by cable operators to MDUs and HOAs also inhibits the Congressional goal, as expressed in the CCPA and the 1992 Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992), of increasing competition in the provision of multichannel video programming. *See Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates*, 706 F. Supp. 422, 435 (D. Md. 1989).

ownership interest ceases and the property owner's or resident's ownership commences.

The FCC currently has two categories of demarcation points -- one for cable operators and one for telephone companies. The cable demarcation point is 12 inches outside of where the cable enters the premises²⁰ and for MDUs, 12 inches outside of where the cable enters the individual unit.²¹ Like cable, telephone has disparate demarcation points depending upon whether that point is a single family home or MDU. For single family dwellings, the demarcation point is up to 12 inches inside the home. Telephone companies are authorized to determine the demarcation point in MDUs as long as they have a consistent policy. The Commission requests comment on the appropriate demarcation point for cable, telephone, and broadband services.

Charter and Comcast believe that the introduction of broadband services by multiple providers necessitates a consistent demarcation point which should be the demarcation point for cable and not the one for telephones. Particularly in light of the Telecommunications Act of 1996 in which telecommunication service providers will gain access to easements and conduits of the LECs, it makes no sense to have

²⁰ Although the definition of premises includes both land and structure on it, the Commission interprets premise to only include the structures on the property. *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act: Cable Home Wiring*, MM Docket No. 92-260, First Report and Order, slip op. at ¶ 20 (1993).

²¹ Charter and Comcast have filed comments in the Further Notice of Proposed Rulemaking in MM Docket No. 92-260 addressing the issue of the applicability of this demarcation point to MDUs. Charter and Comcast incorporate those comments by reference.

multiple demarcation points based on a historic separation of services.²² Rather, the Commission must adopt one demarcation point so that all potential providers operate on an even playing field. When all potential providers operate with the same rules, individual consumer choice, competition and universal service goals all benefit.

A. Single-Family Dwellings

Charter and Comcast believe that the cable demarcation point is appropriate for the provision of broadband services to single family dwellings. This ensures that the resident has maximum choice in selecting the appropriate broadband provider. Under this arrangement, multiple wires would be installed in easements designated for use by various utilities and the property owner then could select which providers would do the final installation to the house.

A multiple provider environment will empower individual customers in single family homes, be they in HOAs or not, to select the provider or providers they believe are most appropriate for their needs. Multiple broadband service providers also increase competition, improve the introduction of new telecommunication technologies,²³ and help ensure universal service. In addition to comporting with

²² Charter and Comcast do not take any position on the interpretation of the access provisions of the Telecommunications Act of 1996. Charter and Comcast simply note that the law may obviate any distinction between different demarcation points since cable operators, in order to provide telephony service, may utilize the demarcation point of the LEC.

²³ For example, cable operators began offering digital music services to provide CD quality music to the home over a cable system's wire without the need to actually obtain multichannel video programming to consumers. Other cable operators are experimenting with cable modems to provide greater access to the Internet. Finally, cable operators have been the leaders in researching digital compression of broadband signals. All of these technical innovations have arisen due to cable's efforts to differentiate itself from other providers of video programming.

the Commission's desire to maximize consumer choice, the use of the cable demarcation point fits the current requirements concerning prevention of signal degradation and leakage for broadband services. The need to comply with Commission technical standards will be extremely important to ensure that multiple providers do not cause undue interference with each other.

Any provider of broadband service will have to ensure that they meet various technical requirements such as prevention of signal leakage and interference. Charter and Comcast do not believe that homeowners have the technical capabilities to ensure that these requirements are met. The possibility that a multiple provider universe will turn into a Tower of Electronic Babel without strict adherence to leakage and interference standards certainly militates in favor of requiring the provider to perform this function. The fact that individuals may own a portion of the network (from the demarcation point into the home) will still enable service providers to prevent leakage and interference.²⁴

B. MDUs

The demarcation point for broadband services in MDUs also should be the same for all broadband service providers. Charter and Comcast assert that the appropriate demarcation point should be at the wall plate of the individual unit, or in the telephone context, at the connector within each residential unit. In essence, Charter and Comcast assert that any wiring buried in the walls of the individual unit will still be owned by the broadband service provider.

²⁴ Cable operators still are required to meet the technical standards set forth by the Commission in 47 C.F.R. §§ 76.601-.30 even though they may not own the inside wiring in the residences.

Adoption of this demarcation point also provides an appropriate delineation between equipment owned by the broadband service provider and customer premises equipment. Anything from the wall plate to the residential unit would be considered customer premise equipment.²⁵

As with the single family home model, the broadband service provider would be obliged to ensure that signal leakage and interference do not occur. This obligation is particularly important for rental MDUs since the tenant may not have the authority to take the necessary maintenance actions required to reduce excessive leakage or interference.

This demarcation point also should resolve most issues that the Commission raises with respect to the distinction between complex and simple wiring. NPRM at ¶¶ 31-37. The only modification would be that, to the extent a commercial building or MDU, installed key systems, private branch exchanges, or shared tenant service facilities, those facilities would be owned by the property owner.²⁶ While maintenance of those facilities would be left to the property owner, the requirements for signal leakage and interference still should be met by the broadband service provider. The Commission may wish to condition the ownership of such systems on the existence of a maintenance contract with the broadband service provider and

²⁵ Charter and Comcast note that the Commission requested comment on whether it should establish a competitive market for broadband customer premises equipment. The FCC also sought comment on what authority it could do so. The Telecommunications Act of 1996 mandates that the Commission establish the standards that would permit a competitive market to exist for cable customer premises equipment. The results of that rulemaking undoubtedly will affect the outcome of this docket.

²⁶ If the broadband provider installed the equipment, then obviously it would be the property of the broadband provider.

owner of these complex distribution mechanisms to ensure that FCC technical standards are not violated.²⁷

The benefits to be gained from this demarcation point are even greater than in the single family home concept. As has already been noted in these comments, property owners of MDUs may act as gatekeepers prohibiting individual residents from selecting the most appropriate provider to meet that tenant's broadband service needs. Charter and Comcast see no reason to empower the landlord to deprive the tenants of the full potential of broadband services simply because the landlord may profit from the entry of one provider and the denial of access to other providers.²⁸ The alternative providers often make payments directly to the property owner to obtain access. Cable operators, on the other hand, generally do not make such payments because they already are paying franchise fees, which the alternative video providers do not have to pay. The public interest benefits of

²⁷ This might be considered the broadband equivalent of the current requirement that complex wiring systems interconnect to the telephone network only through a telephone-company provided jack.

²⁸ In *Multi-Channel Television v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113 (4th Cir. 1995), the franchised cable operator was denied access to certain rental MDUs because it was unwilling to violate a state statute and pay the property owners a special fee to provide service. A wireless operator, however, made such payments to the property owners. The wireless operator and the property owners challenged the lower court's finding that the Virginia prohibition on such payments was unconstitutional. The Fourth Circuit rejected that notion pointing out: 1) that the statute merely prohibits a particular use of the property (exclusive fee arrangement access by a multichannel video providers) and not a physical invasion of the property; 2) does not deprive the owner of all economically viable uses of the property (the statute only prohibits the landlord from obtaining revenue from only particular source of income); and 3) application of the statute did not deprive them of their investment-backed expectation because it was inconceivable that rental MDUs were bought primarily to obtain income from access fees paid by various multichannel video providers. *Id.* at 1123-24.

universal service and competition sufficiently outweigh the minor deprivation that would be suffered by MDU owners if they were unable to prevent multiple providers from obtaining access to individual residents.

C. Barriers to Entry

Some wireless cable and SMATV operators will and have argued that the demarcation point suggested by Charter and Comcast erects a substantial barrier to entry. Charter and Comcast, from their experience, do not believe that these alternative multichannel video providers will find nor have they found that the barrier is particularly significant.

Usually SMATV and wireless operators install their own wiring to avoid disputes concerning the ownership of wiring in a MDU. In the few instances in which cable operators are faced with disputes with alternative video providers over the ownership of wiring, invariably, the SMATV or wireless operator agrees to install its own wiring in the MDU. For example, Comcast was forced to initiate an action against a wireless cable operator for having taken over the internal cable distribution system within a condominium MDU that Comcast had installed, maintained, and claimed ownership over through a contract with the condominium association located in southwest Florida. Ultimately, after litigation, the parties settled their dispute with respect to that specific MDU and all others in the area requiring the wireless operator to post-wire all buildings in which it sought entry that Comcast claimed contractual ownership of the internal distribution system. Charter has had a similar situation in Missouri, which resulted in the wireless operator agreeing not to use any of the internal distribution system to deliver its programming.

The settlements belie the assertion by alternative video providers that ownership of the wiring by the cable operator constitutes a significant barrier to entry. First, they attempt to gain free access to the internal distribution system in an effort to artificially lower the price of their service. Second, and more significantly, the actual cost of adding an additional internal distribution system is not expensive; in fact, the wireless cable operator sued by Comcast admitted that it would cost less than \$10,000 to post-wire the condominium building. While the cost in other MDUs will depend on building size and its architecture, post-wiring rarely represents the barrier that SMATVs and wireless operators contend.

V. Connection Standards

Charter and Comcast believe that it is premature to adopt specific standards for complex wiring and connection of broadband networks to customer premises equipment. First, the convergence of technologies is in an incipient and evolutionary stage. Adoption of a specific connection standard may be outdated by the time the Commission considers the standard and imposes it upon the public. Second, the regulatory standards for the multiple service providers have not yet been written. These standards, including such requirements as access to conduits and wires within buildings, may alter the type of connection that will be utilized. Finally, given the recent changes wrought in the telecommunications industry by enactment of the Telecommunications Act of 1996, Charter and Comcast's strategies for exploiting these changes are in flux. It makes no sense to proffer a connection standard based on a one vision of this convergence when another vision may be more appropriate. In any event, the connection standard ultimately adopted by the Commission must ensure that it is relatively transparent to the customer, i.e., the